APPENDIX A

IN THE SUPREME COURT OF GEORGIA

No. S07A1210

[Decided November 5, 2007]

ROGERS)
)
v.)
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THE STATE)
)

Hunstein, Presiding Justice.

James Randall Rogers was convicted of murder and sentenced to death in 1985. *See Rogers v. State*, 256 Ga. 139 (344 SE2d 644) (1986). Rogers thereafter sought habeas corpus relief alleging that he is mentally retarded. Pursuant to *Fleming v. Zant*, 259 Ga. 687 (4) (386 SE2d 339) (1989), *see also Rogers v. State*, 276 Ga. 67 (1) (575 SE2d 879) (2003), a jury determined in 2005 that Rogers is not mentally retarded. He appeals. Finding no reversible error, we affirm.

1. Rogers has the burden of proving that he is mentally retarded by a preponderance of the evidence. *Fleming, supra*, 259 Ga. at 691. Mental retardation is defined as "significantly subaverage general

intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." OCGA § 17-7-131 (a) (3). The jury heard evidence regarding six intelligence quotient ("IQ") tests administered to Rogers during his lifetime, with scores of 78, 84, 85, 68, 66 (which, due to a mathematical error, should have been 70) and 89. Expert testimony established that IQ scores between 70 and 84, while indicating borderline intellectual functioning, do not indicate mental retardation. Additionally, there was testimony that Rogers checks out prison library books on a regular basis and is able to use the computer. Three State experts who examined Rogers opined that he is not mentally retarded; three experts for Rogers disagreed. Although evidence was adduced indicating that Rogers exhibits brain dysfunction, Rogers's own expert testified that there is no way to determine what caused the dysfunction and that a person can have brain dysfunction without being mentally retarded. This expert also testified that the use of drugs and alcohol can have a significant impact on brain function and that Rogers had reported using drugs and alcohol.

Construing the evidence in favor of the verdict, a rational trier of fact could have found that Rogers failed to meet his burden of proof. *See Morrison v. State*, 276 Ga. 829, 830-831 (1) (583 SE2d 873) (2003). *See also Stripling v. State*, 261 Ga. 1, 4 (3) (b) (401 SE2d 500) (1991) (IQ test scores of 70 or below are not conclusive); *Fleming, supra*, 259 Ga. at 691 (jury not bound by expert opinions or test results, "but may weigh and consider all evidence bearing on the issue of mental retardation").

2. (a) Rogers's death sentence does not violate his equal protection and due process rights merely because, at age 19 when he committed the crimes, he may have possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit the imposition of the death penalty on offenders under age 18. *Roper v. Simmons*, 543 U.S. 551, 574 (III) (B) (125 SC 1183, 161 LE2d 1) (2005). That Court recognized that "a line must be drawn" and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* at 574.

(b) Rogers also argues that his equal protection and due process rights were violated because, due to his "organic brain damage," he has the same diminished capacities enumerated in *Atkins v. Virginia*, 536 U.S. 304, 318 (IV) (122 SC 2242, 153 LE2d 335) (2002) that are characteristic of a mentally retarded defendant, but he is treated differently because he does not have IQ scores under 70. However, Georgia's statutory definition of mental retardation is consistent with the clinical definitions relied upon in *Atkins*, compare *id.* at 308, n. 3 with OCGA § 17-7-131 (a) (3), and, contrary to Rogers's contentions, there are no "hypertechnical" requirements that a defendant have certain test scores in order to be found mentally retarded. *See Stripling, supra*, 261 Ga. at 4. We conclude that Rogers's arguments in this regard are without merit. *See* generally *Fleming, supra*, 259 Ga. at 688 (1).

We reject Rogers's contention that the trial court abused its discretion by not submitting to the jury

special interrogatories based on *Atkins* (wherein the jury would find whether Rogers has certain enumerated "diminished capacities"), along with related jury instructions and a verdict form utilizing the statutory definition of mental retardation. The trial court properly followed the procedures this Court established for *Fleming* trials by instructing the jury on the statutory definition of mental retardation set forth in OCGA § 17-7-131 (a) (3); by charging the jurors that Rogers bore the burden of proving his mental retardation by a preponderance of the evidence; and by charging the jury that they were not bound by the opinion testimony of expert witnesses or by test results, but could weigh and consider all evidence bearing on the issue. *See Fleming, supra*, 259 Ga. at 691. *See* generally *Sims v. Heath*, 258 Ga. App. 681, 687 (577 SE2d 789) (2002) (form of verdict and submission of special verdict are within trial court's discretion and will not be overturned absent abuse of that discretion).

3. We find no abuse of the trial court's discretion in the exercise of its inherent power to control court proceedings by limiting the number of attorneys permitted to speak before the court to the two attorneys appointed to Rogers. *Lynd v. State*, 262 Ga. 58, 62 (9) (a) (414 SE2d 5) (1992). Although the trial court prevented a pro bono member of Rogers's defense team from arguing certain motions, it did not prevent her from continuing to assist defense counsel. Compare *United States v. Gonzalez-Lopez*, ___ U. S. ___ (126 SC 2557, 2563, 165 LE2d 409) (2006). Rather, it merely limited argument to Rogers's lead counsel and co-counsel, both of whom were appointed two years before Rogers's trial with his full agreement and

in response to his counsel's motion that, as a precautionary measure, death-qualified counsel be appointed. *See* Unified Appeal Procedure (II) (A) (1). Furthermore, Rogers's co-counsel, who ultimately argued the motions at issue, never intimated that he was not prepared to go forward. The record shows that he was familiar with the facts and issues involved, having the previous day conducted the expert's deposition that formed a substantial basis for the motions, and the trial court had before it the written motions and supporting briefs submitted by Rogers's counsel.

4. Rogers contends that the trial court erred by conducting his mental retardation trial as a civil, rather than a criminal, proceeding. *See* generally *Stephens v. State*, 270 Ga. 354, 356 (2) (509 SE2d 605) (1998) (*Fleming* trial is deemed part of guilt/innocence phase). Specifically, Rogers argues that the trial court erred by failing to follow OCGA § 15-12-166, which provides that in criminal cases the State must accept or reject each potential juror before the defendant is required to do so. However, our review of the record establishes that Rogers repeatedly reiterated that his *Fleming* trial should be conducted as a civil proceeding,[1] that the trial court denied Rogers's

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[1] During the pretrial conference, the trial court asked defense counsel, "[I]s this in the nature of a civil case?" to which counsel responded unequivocally, "Yes, sir." Additionally, counsel stated to the jury during voir dire that "the Georgia law on what you as a jury will be looking at in this particular case . . . is a civil matter"; stated in opening that, "This is, as the Judge said, a civil case dealing with one issue"; and proceeded under and argued the

request regarding the order of juror questioning based on these representations by counsel, and that Rogers then acquiesced to the trial court's ruling.[2] Under these circumstances, we find that Rogers has waived any objection to the trial court conducting his *Fleming* trial as a civil proceeding and to the order of the exercise of his peremptory challenges. *See Pye v. State*, 269 Ga. 779, 787 (14) (505 SE2d 4) (1998) (party cannot ignore perceived error at trial, take chance on favorable verdict, and then complain on appeal).

5. Any error in the application of OCGA § 15-12-165 (State and defendant in death penalty cases each allowed 15 peremptory challenges) to

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civil rules for the admission of expert testimony. *See* OCGA § 24-9-67.1 and Division 7, *infra*.

[2] The trial transcript shows that once voir dire was completed and counsel were preparing to strike the jury, the following exchange took place:

[Defense Counsel]: And who goes first?
THE COURT: Well, you get to go first.
[Defense Counsel]: We would like for the State to go first.
THE COURT: Well, you know, this -- you are going to get to make the first opening statement. You are going to get to open and close of the final argument. . . . [T]his is, we say a civil case, . . . And so, I'm switched over to the civil rules to the extent that I can possibly do that. So, you know, that being the case, you know, you are going to have to go first.
[Defense Counsel]: I understand, Judge.
THE COURT: Okay.
[Defense Counsel]: I just wanted to get that clarified.

Rogers's trial was invited by defense counsel and, as such, is not grounds for reversal. *Pye*, *supra*, 269 Ga. at 787 (14). *See also Madison v. State*, 281 Ga. 640, 642 (2) (c) (641 SE2d 789) (2007) (defendant not deprived of protected right by retroactive application of OCGA § 15-12-165, reducing number of peremptory strikes, as peremptory strikes are procedural and not substantive in nature).

6. Rogers contends the trial court erred by admitting the testimony and materials of the State's witness, psychologist Dr. Richard Hark. Dr. Hark examined Rogers in 1976 when he was in a juvenile detention center and administered intelligence and personality tests to Rogers in 1977 at the request of the juvenile court (the "1977 report"). Dr. Hark administered these tests again in 1980 during the course of Rogers's murder trial[3] pursuant to an order of the trial court, which was entered in response to the request by Rogers's counsel for a psychological evaluation (the "1980 report"). In his mental retardation trial, Rogers filed motions in limine to exclude Dr. Hark's testing materials and testimony; the trial court deferred its ruling until the State sought to introduce this testimony and evidence during trial, when Dr. Hark would be available for voir dire.

(a) As to the 1977 report, Rogers called a mental health expert who had executed an affidavit in which

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[3] Rogers's original convictions and sentences in 1982 were reversed on direct appeal due to the unconstitutional composition of the Floyd County grand jury. *Devier v. State*, 250 Ga. 652 (1) (300 SE2d 490) (1983).

the expert stated he considered Dr. Hark's 1977 report when rendering his opinion. The State cross-examined the witness about the 1977 report and the trial court overruled Rogers's objection because of his expert's affidavit. Rogers then explored the validity of the 1977 report on re direct. Subsequently, when the State sought to call Dr. Hark, the trial court examined the witness and ruled inadmissible his testimony and materials related to the 1977 report, finding that Dr. Hark had seen Rogers for treatment. *See State v. Herendeen*, 279 Ga. 323 (613 SE2d 647) (2005) (psychotherapeutic privilege invoked when treatment given or contemplated).

Rogers contends the trial court erred by deferring its ruling. However, a "trial court has an absolute right to refuse to decide the admissibility of evidence . . . prior to trial. [Cits.]" *State v. Johnston*, 249 Ga. 413, 415 (291 SE2d 543) (1982). Although Rogers also contends the trial court erred by refusing to give a curative instruction regarding Dr. Hark's 1977 report, Rogers acquiesced during the charge conference to the trial court's decision to give the jury a general curative instruction to consider as evidence only the exhibits admitted and with them in the jury room, which did not include the 1977 report. Because Rogers did not object or request further instructions after the jury was charged, he has failed to preserve this issue for appeal. *Fann v. State*, 254 Ga. 514, 517 (3) (331 SE2d 547) (1985).[4]

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[4] We note that defense counsel in closing argument stated to the jury that the tests administered by Dr. Hark in 1977 had been

(b) As to the 1980 report, the trial court admitted Dr. Hark's testimony and materials, finding that Dr. Hark saw Rogers only for evaluation purposes, specifically to explore the possibility of an insanity plea, rather than for professional treatment. *See Herendeen, supra*, 279 Ga. at 326. Rogers challenges this ruling, first contending that these materials are protected by the psychologist/patient privilege, OCGA §§ 24-9-21 (6) and 43-39-16, because the order directing Dr. Hark to examine Rogers stated that "the relationship between Dr. Hark and Defendant Rogers shall be treated as if the Defendant himself were the employer of Dr. Hark." However, the order also states that "[c]ommunications between [Rogers] and a private psychologist would be privileged . . . as long as there was an expectation of confidentiality." Under Georgia law, there can be no expectation of confidentiality based on the psychologist/patient privilege when the sole purpose of the relationship is evaluation. *Herendeen, supra*. Even assuming, arguendo, that such privilege existed as to the 1980 report, when Rogers "raise[d] a claim of mental retardation, putting [his] mental capacity at issue, 'such affirmative defense waive[d] the privilege under OCGA § 24-9-21 (5) through (8).' [Cit.]" *Perkinson v. State*, 279 Ga. 232, 236 (6) (610 SE2d 533) (2005). We reject Rogers's argument that because the psychologist/patient privilege has been placed on a par with the attorney/client privilege, OCGA § 43-39-16, it affords any greater protection. *See Wiles v. Wiles*, 264 Ga. 594, 599-600 (449 SE2d 681) (1994) (Sears, J.,

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removed by the trial court and the jurors should "wipe [their] mind[s] clear of those particular documents."

concurring) (Legislature did not intend to give psychologists' patients greater protection than psychiatrists' patients).

Citing OCGA § 9-11-26, Rogers also contends that the 1980 report is protected under the work product doctrine. Pretermitting whether Rogers is correct in relying on the Civil Practice Act, see Division 4, *supra*, the trial court did not abuse its discretion by ruling that Rogers had waived any privilege based on work product. In 2001, the State sought to obtain Rogers's records "relat[ed] to his mental abilities." After a hearing, the trial court found that the records sought by the State "are essential for the defense of the action pending before the Court" and ordered that Rogers's mental health records, including those of Dr. Hark, be released to the State. As Rogers failed to assert his work product privilege claim at that time, it was waived. *See Gen. Motors Corp. v. Conkle*, 226 Ga. App. 34, 46-47 (2) (486 SE2d 180) (1997).

7. Pretermitting whether the trial court erred by applying OCGA § 24-9-67.1 (expert witness testimony in civil proceedings) rather than OCGA § 24-9-67 (expert witness testimony in criminal cases), see Division 4, *supra*, we find no error in the admission of testimony of the following expert witnesses.

(a) The trial court qualified James Mills, a licensed professional counselor and qualified psychometrist, as an expert in the administration of intelligence tests after hearing testimony regarding his relevant education and experience. Mills testified for the State regarding the Wechsler Adult Intelligence Scales-Third Edition test (WAIS-III) he administered

to Rogers in 2000. He testified that he does not independently perform the tests, *see* OCGA § 43-10A-22; rather, he assists psychologists by performing psychometrics, i.e., the administration of the tests; the tests are subsequently interpreted by a supervising psychologist. He testified that he recorded Rogers's responses, as he had been trained to do, and turned over the completed test, including his notes and scoring calculations, to his supervisor, licensed psychologist Dr. Don Harris, who reviewed and interpreted Rogers's responses to the test. Mills's testimony was limited to the manner in which the test was administered and he never gave an opinion as to whether or not Rogers is mentally retarded.

We reject Rogers's argument that Dr. Harris had to be physically present in the room with Mills during Rogers's testing session in order to supervise him. Nor has Rogers shown from Mills's unrebutted testimony regarding the manner in which the testing was conducted that the results were unreliable. We find no abuse of the trial court's discretion in qualifying Mills as an expert, *Williams v. State*, 279 Ga. 731, 732 (2) (620 SE2d 816) (2005), or in admitting the sufficiently relevant and reliable evidence regarding the WAIS-III test administered by Mills. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U. S. 579, 597 (IV) (113 SC 2786, 125 LE2d 469) (1993); *Atkins, supra*, 536 U. S. at 309, n. 5 (WAIS-III is standard instrument for assessing intellectual functioning); *Gen. Elec. Co. v. Joiner*, 522 U. S. 136, 139 (118 SC 512, 139 LE2d 508) (1997) (standard of review for *Daubert* ruling is abuse

of discretion).[5] The weight and credibility to give the testimony of Mills was a matter for the jury. *Boswell v. State*, 275 Ga. 689, 691 (2) (572 SE2d 565) (2002).

(b) Dr. Samuel Perri, who was qualified as an expert in the field of forensic psychology, testified that he was experienced in administering WAIS III tests; that he reviewed the raw data from the WAIS-III administered to Rogers by Mills in 2000 and consulted with Dr. Harris, who had supervised Mills; that he conducted a clinical interview with Rogers; and that he relied on these and other factors to form his professional opinion that Rogers is not mentally retarded. Defense counsel subjected Dr. Perri to a thorough and sifting cross-examination. The trial court did not abuse its discretion by allowing this evidence, and the weight and credibility to give the WAIS-III and Dr. Perri's testimony was a matter for the jury. *Boswell, supra*.[6]

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[5] Although Rogers contends that a comparison of the answers given by him in the 1977, 1980 and 1995 intelligence tests with those recorded in the test administered by Mills indicates that prosecutorial misconduct occurred, he has failed to set forth any evidence to prove this allegation. *See Richey v. State*, 261 Ga. App. 720, 724 (2) (583 SE2d 539) (2003).

[6] Rogers contends that if Mills was supervised by Dr. Harris, and Dr. Harris interpreted the WAIS-III administered by Mills, the testimony of both Mills and Dr. Perri regarding the test results constituted impermissible testimonial hearsay, as Rogers was denied his right to confront Dr. Harris. *See Crawford v. Washington*, 541 U. S. 36 (124 SC 1354, 158 LE2d 177) (2004). Pretermitting whether any statements made by Dr. Harris would

(c) Contrary to Rogers's contention, the record establishes that Dr. Hark formed his opinion regarding Rogers's mental status based on his clinical interview with Rogers and intelligence testing and not upon the personality tests, later determined to be unreliable, that he administered to Rogers in 1977 and 1980. We thus find no abuse of the trial court's discretion by allowing Dr. Hark to testify.

(d) The trial court did not err by denying Rogers's request to admit testimony regarding the contents of affidavits used, in part, by his expert witnesses as the basis for their opinions regarding Rogers's mental status. Applying OCGA § 24-9-67.1 (a) (otherwise inadmissible facts used as basis for expert opinion shall not be disclosed to jury unless court determines their probative value substantially outweighs their prejudicial effect), the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as they rested on the veracity and competency of persons not in court, OCGA § 24-3-1 (a), and did not come within any statutorily-recognized hearsay exception. *See* OCGA §§ 24-3-3 through 24-3-17.[7] The trial court then balanced the probative value of these affidavits against their prejudicial effect, noting that the affidavits were

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be considered testimonial, *id.* at 68, neither Mills nor Dr. Perri testified as to any such statements.

[7] While Rogers argues that one of the affidavits was admissible under the necessity exception because the affiant was deceased, OCGA § 24-3-1 (b), the trial court did not err by finding that Rogers failed to make the requisite showing for its admission. *See Chapel v. State*, 270 Ga. 151, 155 (510 SE2d 802) (1998).

originally submitted in Rogers's habeas proceeding. Several of them contained identical language, casting suspicion on their trustworthiness, and some contained conclusory statements and irrelevant and prejudicial information related to Rogers's alleged alcohol and drug use and the crime for which he was convicted. As the little probative information the affidavits contained was cumulative of other evidence and not needed to explain the basis for the experts' opinions, the trial court did not abuse its discretion by refusing to admit the information contained in the affidavits. *See Leonard v. State*, 269 Ga. 867, 870-871 (3) (506 SE2d 853) (1998) (testifying expert not to serve as conduit for opinions of others).

8. Although "a witness may not be impeached based upon a discrepancy relating to a wholly immaterial matter, [cit.]" *Brown v. State*, 260 Ga. 153, 156 (4) (391 SE2d 108) (1990), we find no error in the trial court's admission of impeachment evidence introduced by the State that reflected on the credentials and competency of a defense expert witness, a collateral issue that was indirectly material to the issue in the case. *Carswell v. State*, 263 Ga. App. 833, 834 (2) (589 SE2d 605) (2003). The State's evidence reflected that at the time a defense expert in the field of psychology prepared an affidavit indicating his opinion that Rogers manifested substantially subaverage intellectual functioning before age 18, the expert was on probation following a suspension by the Georgia State Board of Examiners of Psychologists; the State's evidence rebutted the expert's trial testimony regarding the grounds for that suspension and included the Board's decision that the expert's admitted conduct fell below minimum standards of

care. This evidence reflected on the expert's credentials and competency, thus challenging his credibility and opinion as to Rogers's intelligence, the issue in this case. Under the circumstances, we conclude that the trial court did not abuse its discretion in admitting the impeachment evidence. *See Kennebrew v. State*, 267 Ga. 400, 403 (3) (480 SE2d 1) (1996) (scope of cross-examination lies in sound discretion of trial court). Compare *King v. State*, 273 Ga. 258, 273 (30) (539 SE2d 783) (2000) (questioning defense expert about *pending* complaint against him was improper impeachment).[8]

9. We find no error in the admission of two letters handwritten by Rogers that were used by the State to cast doubt on his mental retardation claim.

> Proof of handwriting may be resorted to in the absence of direct evidence of execution. In such case, any witness who shall swear that he knows or would recognize the handwriting shall be competent to testify as to his belief. The source of his knowledge shall be a question for investigation and shall go entirely to the credit and weight of his evidence.

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[8] Assuming, arguendo, that the issue is properly before us, the trial court did not err by allowing the decision of the Board to go out with the jury because the prima facie evidentiary value of the decision was not dependent on the credibility of its drafter and thus it was not subject to the continuing witness rule. *Bryant v. State*, 270 Ga. 266, 270-271 (3) (507 SE2d 451) (1998).

OCGA § 24-7-6. A Department of Corrections employee authenticated the letters after testifying that he would recognize Rogers's handwriting because he had observed Rogers sign his name and had received written communications from him. The witness's statement that the handwriting in the body of the letters "appears to be that of Mr. Rogers" did not render his testimony too tentative to support a finding of authenticity. *See Jones v. State*, 165 Ga. App. 260, 261 (1) (299 SE2d 920) (1983).

10. A correctional officer was called by the State to testify regarding Rogers's behavior while incarcerated. Rogers maintains that the trial court erred by allowing irrelevant and prejudicial testimony by this witness, namely, that Rogers is not housed in the area of the institution with those inmates the officer had been told are mentally retarded. The officer's testimony was relevant to the issue of Rogers's adaptive skills, however, and was not unduly prejudicial because the officer clarified that he was not diagnosing anyone. We also find no merit in Rogers's argument that this testimony constituted an impermissible lay opinion, *see* OCGA § 24-9-65, because the officer was never asked for, nor did he ever give, an opinion as to the ultimate issue, i.e., whether Rogers is or is not mentally retarded.

11. "[I]t remains the case that '(t)his State does not recognize the cumulative error rule' [cit.]," *Schofield v. Holsey*, 281 Ga. 809, 812, n. 1 (642 SE2d 56) (2007), and we decline to do so under the circumstances of this appeal.

Judgment affirmed. All the Justices concur.

APPENDIX B

SUPREME COURT OF GEORGIA

No. S07A1210

[Filed January 13, 2003]

ROGERS	)
	)
v.	)
	)
THE STATE.	)
	)

Doffermyre, Shields, Canfield, Knowles & Devine, LLC, Ralph I. Knowles, Jr., C. Rebecca Smith, Andrews & Knowles, C. Cooper Knowles, Atlanta, for appellant.

Bryant G. Speed, II, Dist. Atty., Thurbert E. Baker, Atty. Gen., Susan V. Boleyn, Senior Asst. Atty. Gen., for appellee.

HUNSTEIN, Justice.

Appellant James Rogers challenges the trial court's order finding that he waived his request for a jury trial on the issue of mental retardation pursuant to *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989). Because we hold that a defendant who was tried for a capital crime prior to July 1, 1988 cannot waive his request

for a hearing to determine whether he is mentally retarded once a court finds sufficient credible evidence of mental retardation to create an issue for a jury, we reverse and remand to the trial court.

1. Rogers was convicted and sentenced to death for the murder of Grace Perry.[1] His convictions and sentence were affirmed by this Court on direct appeal. *See Rogers v. State,* 256 Ga. 139, 344 S.E.2d 644 (1986). Following the procedure outlined by this Court in *Fleming,* in 1994 Rogers initiated state habeas corpus proceedings by filing a petition seeking a jury trial on the issue of mental retardation. At a hearing on his petition, Rogers presented evidence of mental retardation, including affidavits of mental health experts who diagnosed him as mentally retarded and suffering from significant neurological impairment.[2] In a May 1995 order the habeas corpus court concluded that a genuine issue of fact existed regarding Rogers' mental retardation and granted the writ for the purpose of conducting a *Fleming* trial.

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[1] Rogers was convicted in 1982 for the murder of Perry and aggravated assault of Edith Polston and sentenced to death. On direct appeal, this Court reversed his convictions and sentences based on the unconstitutional composition of the Floyd County grand jury. *See Devier v. State,* 250 Ga. 652(1), 300 S.E.2d 490 (1983). After a second trial, Rogers was again found guilty of murder and aggravated assault and sentenced to death for the murder conviction and a consecutive ten-year sentence for aggravated assault.

[2] Rogers also provided affidavits of teachers, former attorneys, and family members supporting the diagnosis of mental retardation.

On return to the trial court, counsel was appointed to represent Rogers in the jury trial on the issue of mental retardation. In February 2001, just before the scheduled hearing, Rogers wrote a letter to the judge asking for the dismissal of the mental retardation trial. The court held a hearing on Rogers' request during which Rogers stated to the court that he was not mentally retarded. The following day the trial court entered its order finding Rogers "knowingly and voluntarily waive[d] his right to a jury trial on this issue of mental retardation."

In March 2001, with new counsel, Rogers filed a "Consolidated Motion to Vacate Dismissal of Mental Retardation Trial, To Withdraw Waiver, To Reinstate Mental Retardation Trial And/Or Notice of Appeal to Dismissal Order." An attachment to the motion contained a handwritten note from Rogers stating, "I want to have my case back in court. I want to have the court rule on my innocence. I want the court to rule on my IQ." The trial court conducted a hearing on this motion in June 2001. Before the court ruled on the motion, however, Rogers mailed another letter to the court stating, "I do not want the mental retardation trial and I would like it dismissed." On July 24, 2001, the trial court entered an order denying the motion and holding that Rogers waived a jury trial on the issue of mental retardation. Rogers' direct appeal of that order was dismissed as untimely. He thereafter filed a motion for and was granted an out-of-time appeal. On appeal, Rogers challenges the trial court's order finding that he waived his right to a trial on the issue of mental retardation.

2. Under both the Georgia and United States Constitutions, a criminal defendant may not be put to death if he is found to be mentally retarded. *See Atkins v. Virginia,* 536 U.S. 304(IV), 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Fleming, supra*, 259 Ga. at 690, 386 S.E.2d 339. Accordingly, where a defendant's mental capacity is challenged or otherwise appears to be in question, the Georgia and United States Constitutions require adjudication of the defendant's mental capacity in order to determine his or her eligibility for a death sentence. In Georgia, the procedure to be followed in making such a determination depends upon the date of trial. For those defendants tried after July 1, 1988, OCGA § 17-7-131 permits them to contend that they were mentally retarded at the time of the crime and to present evidence of such mental retardation to the fact finder. In capital cases, the fact finder is then required to determine during the guilt-innocence phase of trial whether the defendant is guilty but mentally retarded. OCGA § 17-7-131(j). Under this statutory scheme, where the trier of fact makes a specific finding that the defendant is mentally retarded, the defendant cannot be executed but must instead be sentenced to life imprisonment.[3] *Id.*

A defendant tried prior to July 1, 1988, for whom no judicial determination on mental retardation will

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[3] Because Rogers was tried prior to the effective date of OCGA § 17-7-131, we do not here reach the issue of whether a defendant who has contended pursuant to OCGA § 17-7-131 that he is mentally retarded may thereafter waive a determination of that issue by the fact finder.

have been made, may choose to raise the issue of his or her mental retardation by filing a petition for habeas corpus and presenting sufficient credible evidence, including at least one expert diagnosis of mental retardation, to create a genuine issue regarding retardation. *Fleming, supra* at 691(4), 386 S.E.2d 339.

If, after examining the evidence, the habeas corpus court finds that there is a genuine issue, a writ shall be granted for the limited purpose of conducting a trial on the issue of retardation only. This trial shall be held in the court in which the original trial was conducted. Petitioner shall be entitled to a full evidentiary hearing on the issue of retardation. The determination shall be made by a jury using the definition of retardation enunciated in the statute. *See* OCGA § 17-7-131(a)(3).

Id. The *Fleming* trial allows petitioners to establish judicially whether mental retardation is a genuine issue and obtain resolution of that issue through a jury trial. Once a petitioner carries his burden of proof in the habeas corpus court of creating a genuine issue regarding his mental retardation, the issue must be thoroughly reviewed and passed upon. *Id.* At such point in the proceedings, the issue is no longer subject to waiver by a petitioner. This holding is consistent with our opinion in *Fleming* and the national and statewide consensus against the execution of mentally retarded persons.

3. In this case, pursuant to our decision in *Fleming*, Rogers chose to initiate habeas corpus proceedings by filing a petition alleging he is mentally retarded. He thereafter adduced sufficient credible evidence of such

retardation to authorize the habeas corpus court to grant the writ and remand to the superior court for a full evidentiary hearing on the issue of his retardation. Despite the habeas corpus court's findings and this Court's mandate in *Fleming* that a jury trial be held on the petitioner's retardation when his mental capacity is properly placed in issue, the trial court nevertheless concluded that Rogers could voluntarily waive his right to a trial on retardation. We reject this holding. Once a habeas corpus court finds a petitioner has adduced sufficient credible evidence of mental retardation to create an issue for a jury, it is the duty of the trial court to conduct a jury trial on the issue of mental retardation pursuant to the procedures established in *Fleming*.[4] Because the trial court in this case failed to conduct a jury trial on the issue of Rogers' mental retardation, we reverse and remand to the trial court for proceedings consistent with this opinion.

Judgment reversed and remanded.

All the Justices concur, except CARLEY, J., who dissents.

CARLEY, Justice, dissenting.

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[4] We reject the State's contention that the trial court properly resolved the mental retardation issue by finding in its dismissal order that Rogers is not mentally retarded. The State's argument ignores the plain language in *Fleming* requiring that the determination of whether a defendant is mentally retarded be decided by a jury.

The trial court certainly had the duty to give Rogers the opportunity to try the issue of mental retardation before a jury. *Fleming v. Zant,* 259 Ga. 687, 691(4), 386 S.E.2d 339 (1989). And, in fact, the trial court fulfilled that obligation. Having been granted a jury trial, Rogers elected to waive his right in that regard. Thus, the only issue before this Court is whether he was authorized to do so. Without citing supporting authority, the majority holds that, despite the waiver, it was "the duty of the trial court to conduct a jury trial on the issue of mental retardation pursuant to the procedures established in *Fleming.*" Majority opinion, p. 70, 575 S.E.2d at 882. I disagree and believe that Rogers could and did waive his right to a jury trial, and that the trial court, acting as the trier of fact, properly addressed and resolved the issue of his alleged mental retardation.

Nothing in *Fleming* holds that the procedure which it established is mandatory and cannot be waived. Even the right to trial by jury guaranteed by the Federal and Georgia Constitutions may be waived. Thus, the majority now elevates the right to a jury trial recognized in *Fleming* to a higher status than the comparable constitutional right. However, the purpose of the *Fleming* trial on the issue of retardation is to give defendants "'*essentially the same opportunity* to litigate the issue of (their) mental retardation as (they) would have had if the case(s) were tried today, with the benefit of the OCGA § 17-7-131(j) death-penalty exclusion.' [Cit.]" (Emphasis supplied.) *Burgess v. State,* 264 Ga. 777, 790(36), 450 S.E.2d 680 (1994). Under OCGA § 17-7-131(j), the accused does not have a non-waivable right to a jury trial. That provision clearly provides that, "should ... the jury *or court* find

in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed...." (Emphasis supplied.) Thus, the statute itself contemplates that the matter need not be resolved by a jury and, if Rogers were tried today, he could waive his right to a jury trial.

Accordingly, today's opinion is contrary to the correct construction of *Fleming,* in that it deprives the defendant of the comparable opportunity afforded by OCGA § 17-7-131(j) to waive his right to a jury trial and to submit the issue of mental retardation to the trial court. However, the majority contends that such construction "ignores the plain language in *Fleming* requiring that the determination of whether a defendant is mentally retarded be decided by a jury." Majority opinion, p. 70, fn. 4, 575 S.E.2d at 882, fn. 4. I submit that, to the contrary, the majority's analysis ignores the plain language in OCGA § 17-7-131(j) authorizing an accused to waive his right to a jury determination of mental retardation.

The fact that the 1995 habeas court ruled in favor of Rogers is immaterial. That was an entirely separate proceeding. *Zant v. Foster,* 261 Ga. 450, 451(3), 406 S.E.2d 74 (1991), overruled on other grounds, *State v. Patillo,* 262 Ga. 259, 261, fn. 1, 417 S.E.2d 139 (1992). The habeas court concluded only that there was reason to hold a trial as to retardation. It did not hold that Rogers was retarded or that he had an unwaivable right to have a jury make that determination. After the matter was returned to the trial court, Rogers sought to waive the jury trial he previously obtained from the habeas court. The trial court did not summarily accept this waiver. Instead, it conducted an

evidentiary hearing and found, as a matter of fact, that Rogers was not mentally retarded. The trial court also found that Rogers was aware of the consequences of relinquishing his right to the scheduled jury trial and that he waived that right knowingly and voluntarily. The majority does not contest the sufficiency of the evidence to authorize those findings. Thus, the effect of today's holding is that, as a matter of law, one who is competent to waive his rights and who does so freely and intelligently is nevertheless not bound by his waiver. I submit that, by its creation of a non-waivable legal right to a jury trial, the majority misinterprets *Fleming* so as to deprive a competent accused of the fundamental right to make intelligent and voluntary decisions for himself. The purpose of the judiciary is not to construe the law so as to protect citizens from what the courts perceive to be bad choices, but to ensure that the law as it exists is applied correctly and enforced uniformly. In my opinion, Rogers waived his right to a jury trial under existing law, and that waiver is valid and enforceable despite the majority's holding to the contrary.